COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-67

KEVIN J. KIELY

vs.

JOHN CANTY.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This case arises out of a debt collection action. American Express Bank FSB (Amex) sued the defendant, John Canty, in District Court for breach of a credit agreement. Canty then invoked the arbitration clause of the agreement, and the District Court action was dismissed. Once in arbitration, Canty sought to join the lawyer who had represented Amex in District Court, the plaintiff, Kevin J. Kiely, as a party to the arbitration proceeding. Pursuant to G. L. c. 251, § 2 (b), Kiely filed an action in Superior Court, seeking a declaration that he could not be joined in the arbitration proceeding. A Superior Court judge stayed the arbitration proceeding and declared that Kiely could not be compelled to arbitrate because he was not a signatory to the agreement containing the arbitration clause. Canty moved for reconsideration which was

denied. Canty now appeals from the judgment entered in Kiely's favor, as well as from the order denying his motion for reconsideration. We affirm.

Discussion. A motion for a determination as to whether a party is bound to arbitrate, pursuant to G. L. c. 251, § 2(b), is treated like a motion for summary judgment. See Miller v. Cotter, 448 Mass. 671, 676 (2007); Chambers v. Gold Medal Bakery, Inc., 83 Mass. App. Ct. 234, 241 (2013). Thus, we review de novo the judge's legal conclusion that Kiely was not bound by the arbitration clause of the credit agreement between Amex and Canty. See Licata v. GGNSC Malden Dexter LLC, 466 Mass. 793, 796 (2014).

There is no dispute that Kiely was not a signatory to the credit agreement between Amex and Canty.[1] Canty's primary argument on appeal is that the trial judge failed to consider the applicability of the doctrine of "direct benefits estoppel" to compel Kiely to arbitrate. Direct benefits estoppel is a theory under which a party "knowingly exploiting an agreement with an arbitration clause can be estopped from avoiding

[1] Nonetheless, Canty argues that language in the arbitration clause making it applicable to agents of Amex is sufficient to bind Kiely. Even assuming that Kiely could be considered an agent of Amex as contemplated by the arbitration clause, Amex could not bind Kiely to its arbitration agreement with Canty. See Walker v. Collyer, 85 Mass. App. Ct. 311, 323-324 (2014) ("agency exception remains confined to the acts of an agent binding a principal rather than vice versa").

arbitration despite having never signed the agreement." Walker v. Collyer, 85 Mass. App. Ct. 311, 320 (2014), quoting MAG Portfolio Consult, GMBH v. Merlin Biomed Group LLC, 268 F.3d 58, 61 (2d Cir. 2001). One who knowingly accepts the benefits of an agreement may be bound by its arbitration clause, provided that the benefit is, indeed, direct. See id.

Canty argues that Kiely directly benefited from the credit agreement because the agreement contained a fee-shifting clause that required Canty to compensate Amex for legal fees it incurred collecting its debt from Canty. He argues that Kiely benefited in the sense of being allowed to have his fees accrue and having a reduced risk of not being paid, because Canty would be required to pay whatever Kiely charged.[2] Yet, Canty failed to establish that Kiely "exploit[ed] (and thereby assume[d]) the agreement itself" (quotation and citation omitted). Walker, 85 Mass. App. Ct. at 320. Kiely's only role was to represent Amex in litigation. He neither sought, nor received, any benefit from the credit agreement between Amex and Canty.[3] Indeed, the

[2] He also argues that an additional benefit flowing from the agreement is that Kiely may pursue his litigation fees in arbitration, but Canty acknowledges that Kiely has not accepted the benefit of arbitration.

[3] Canty alleges that Kiely exploited the credit agreement because "he demanded these costs in the complaint." We need not pass on the merits of this contention because the complaint cited by Canty is the one Kiely filed on behalf of Amex which, in any event, makes no reference to legal fees.

fee-shifting clause in the credit agreement was a direct benefit to Amex, not to Kiely.[4]

While Canty also argues that an evidentiary hearing was necessary on the issue of whether Kiely could be compelled to arbitrate on the theory of incorporation by reference, he did not press for such discovery below; nor did he maintain that there were material facts in dispute such that an evidentiary hearing was necessary.[5] As a result, the trial judge cannot be faulted for failing to hold an evidentiary hearing.

Judgment affirmed.

Order denying motion for reconsideration affirmed.

By the Court (Maldonado, Singh & Wendlandt, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: August 7, 2019.

---

[4] The nonbinding cases cited by Canty in support of the proposition that a lawyer may be compelled to arbitrate if he or she accepts legal fees for representing a party to an arbitration agreement are inapposite because they all involved unique scenarios where the lawyer did directly benefit from the arbitration agreement.

[5] At the hearing on Kiely's motion to determine arbitrability, Canty argued that discovery and an evidentiary hearing would be appropriate if the trial judge concluded that the existing facts were insufficient to determine the issue. In his written submissions however, Canty asserted that the existing, undisputed, facts were sufficient to determine the issue.

[6] The panelists are listed in order of seniority.